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# THE CRIMINAL LIABILITY OF LEGAL ENTITIES IN BRAZIL IN LIGHT OF THE NEW ANTI-CORRUPTION LAW

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**Abstract**

The present article focuses on the study of the liability of the legal entity for acts of corruption introduced in the Brazilian system by Law no. 12.846/2013. Meeting internationally agreed commitments, the Brazilian government issued specific legislation against harmful acts to the public administration, including the strict liability of the legal person for acts of corruption committed in their benefit. Thus, in view of the discussion on the criminal liability of legal entities, of the harmfulness of corruption to the economic system and the new Brazilian form of liability, it was intended herein to draw a criticism that may contribute to improving the fight against corruption as well as the liability system of companies in Brazilian law.

**Keywords:** Corruption – Criminal liability of the legal person– Brazilian anti-corruption law

## Introduction

Brazil assumed various international commitments for the fight against corruption as a global phenomenon that causes social and economic damage to all countries independent of their level of development. Amongst these commitments is the development of the accountability of the legal person for acts of corruption carried out in their benefit.

In face of the economic effects generated by the corrupt performance of companies when developing their economic activity and the need to build legal instruments for its prevention and suppression, the production of this study, which aims to analyse the form of accountability introduced in Brazilian Law through law12.846/2013, is justified. The object of this study is the liability of the legal person for acts of corruption arranged for in the new Brazilian code and its possible consequences as a tool to combat corrupt practices. For this purpose, it will be necessary to enter into the discussion of their actual legal nature.

Is the system of corporate liability for acts of corruption introduced in Brazil in accordance with international guidelines on the matter? Is the form chosen by the Brazilian legislature able to generate the expected dissuasive effects? These are the main points to be developed.

Thus, through a literature review of national and international articles, it is intended to bring in elements that will contribute to the evolution of the interpretation of the Brazilian code in order to move forward on the path to the solution for the very relevant problem that corruption represents.

**The criminal liability of legal entities in the Brazilian legal system**

The criminal liability of legal entities, initially established in countries with a *common law* model such as the US, England and Australia, is already a reality in European Criminal Law and constitutes a trend that, sooner or later, will be part of the global reality, including Latin American countries (BACIGALUPO, 2011, p. 95). Currently, in Europe, the criminal liability of legal entities is provisioned for in countries like Spain, Belgium, Denmark, Slovenia, France, Finland, Portugal, Sweden and Switzerland.

The concern with the criminal liability of legal entities stems from the use of the fictitious legal entity structure in order to commit crimes. The characteristics of a hierarchical organization model and the principle of division of labour inherent to the business activity hinders the identification of the individuals responsible for the wrongdoing and their consequent accountability, which fosters a criminal policy of liability of the legal person in order to avoid impunity (RIOS, 2011, p. 203).

There are two ways of attributing criminal liability of legal persons, with the attribution model and the model of liability for its own doing. In the first model, there is a transference relationship, the legal entity is responsible for any acts carried out by any individual in its administrative framework by means of an attribution. In the second, there is an attribution of its own responsibility as a legal person (SILVA SANCHÉZ, 2013, p. 21).

Notwithstanding a reputable part of the doctrine that understands that criminal liability of the legal person would be unconstitutional because it violates fundamental principles of criminal law such as the capacity to act, the principle of culpability, the individuality of the sentencing and punishability (DOS SANTOS, 2008, p. 431), it is true that the Brazilian legislation already provides this regulation, even if it is in a limited way for crimes against the environment. Thus, in certain penal types such as pollution and deforestation the accountability of the legal entity is possible with the application of high penalty fines and restriction of rights such as the interruption of activities.

The model adopted by the Brazilian legislature was the one of required co-authorship between the legal entity and the individual agent, in such a way that the criminal liability of the company is linked to the liability of the person responsible for the action that gave rise to the criminal act (RIOS, 2011, p. 206). In face of the limitations to criminal liability of the legal entity in the Brazilian system, there is still a big barrier to be overcome, especially concerning economic crimes and offenses against the public administration.

However, the application of the criminal standard on the corporate activity may develop in other ways, mainly through the criminal liability of members, officers and employees and through a correlate stream of the economic criminal law doctrine named by the Spanish branch the intervention law. The intervention law would be a sort of middle ground between criminal and civil liability. According to MARTINÉZ-BUJÁN PÉREZ it would be a sanctioning law situated halfway between public and private law characterized by less stringent guarantees and procedures than criminal law and which apply less harmful sanctions to individual rights, aimed at safeguarding the economic relations that violate legal interests of less importance (2011, p. 72).

This line of intervention law is the model adopted in Germany. In the German system, the legal entity may account for crimes and misdemeanours committed by its bodies or by persons exercising power of decision therein, however, such liability is limited to sanctioning through fines and does not have strict criminal law consequences (TIEDMANN, 2010, p. 178). The same is true in Italy, where there is no legal provision for criminal liability of legal entities.

The adoption of this administrative liability sanctioning model of the legal entity does not stray far from the criminal liability. There is no essential difference between the two spheres of liability, except for a quantitative distinction between the values of the fines in

some cases, furthermore, some European Courts, i.e. the Spanish Supreme Court, have already positioned themselves in the sense that some postulates and criminal warranties such as legality, proportionality and culpability should be widely applied also on the sanctioning administrative law, including in relation to attribution systems (BACIGALUPO, 2011, p. 96).

Besides having limited criminal liability of the legal entity, Brazil does not feature this model of sanctioning criminal law in its legal system. The liability of companies in the Brazilian administrative law does not overlap with the model of intervention law, nor does it have a dependency relationship with the criminal law. This situation seems to have changed with the innovations introduced by Law no. 12.846/2013, named the Anti-Corruption Law, which established a new sanctioning model for legal persons involved in unlawful acts of corruption.

**Corruption acts and economic losses**

There is not a clear and accurate definition of what international instruments understand by corruption, given that many acts typified in the national legislations may be characterized within this concept. In its justifications the Merida Convention, i.e., addresses corruption as a very serious phenomenon in a broad sense, and relates the practices of criminal organization and money laundering, where it manifests itself in convergence to a single corruptive behaviour (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p 456). On the other hand, it lists a number of behaviours to be typified that would account for acts of corruption in the strict sense, such as bribery of public officials and diversion of assets.

Corruption as a skewed manifestation of power driven by a personal or third party benefit is as old as the exercise of power itself, it reproduces itself both in democratic systems as well as in authoritarian structures and propagates negative influences on political, international and economic spheres (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p. 454). Nevertheless, it is an offense considered as a major social problem that could jeopardize social stability and security, threaten social, economic development and undermine democratic values (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 193).

Corruption in Brazil dates back to the colonization system that was based on extractivism and the desire for rapid enrichment with the aim to extract the largest possible amount of wealth. In this context there was not a Brazilian moral standard, prevailing the individualism without any collective or patriotic sentiment (HABIB, 1994, p.73). This problem persisted throughout Brazilian history and was fostered by a domination policy imposed during the Colonial, Imperial and Republican periods (HABIB, 1994, p. 77).

The impacts of corruption in the economic activity sphere can be analysed from the perspective of transaction costs. If in the short and medium term the acts of corruption can be seen as facilitators of transactions to overcome bureaucracy and legal requirements through the payment of bribes, in the long term it is a cost that will negatively influence the development of the economic activity, especially with the loss of rationality. The costs of compliance with legal rules will be replaced by the cost of the lack of rationality in a system controlled by bribes and extortion.

The long-term effects of corruption can be devastating because they tend to perpetuate themselves in time and expand in space. This expansion occurs through acceptance and learning of corruption over time, becoming a systemic act. The practice of corruption perpetrated in an institutionalized form constitutes a corruptive cycle of which it is difficult to remain outside, especially for public officials and businessman. In a concrete manner, corruption reduces the efficiency of the use of public funds with an increase in spending and application on unnecessary or unproductive projects, leading the State to a state of economic precariousness. (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p.195). This economic loss arising from acts of corruption will be stronger felt the less economically

developed the State is, to the extent that, in addition to having fewer public resources they present a greater need for investments.

Illegal payoffs due to corruption schemes generate economic losses insofar as they affect the distribution of public benefits and freedom of initiative, conditioning the public performance to the illegal stimuli provided to public officials. On the other hand, the actual costs of corruption schemes arising from the expenditures in order to remain in obscurity are forms of an economic loss arising from this system (ROSE-ACKERMAN, 2010, p. 06). The logic of public performance on behalf of the common good is subverted by a system of retribution to those who act illegally providing unlawful benefits to public officials.

Another negative consequence to the economic order is the disincentive to foreign investments. What at first might seem interesting by overcoming the bureaucracy through illicit financial incentives, in the long term proves negative. This is because a system powered by the payoff of bribes conditions the normal functioning of the foundations of the economic system and breaks the business relationships of rationality, discouraging those who come from another country to expand their business (DE LA TORRE e FABIÁN CAPARRÓS, 2011, p. 460).

In our times, corruption is a global phenomenon that affects countries regardless of their economic status or development, which is why there is international concern with its combat. The subject is a major concern in international criminal policy, which is why in recent years there has been a large movement of intensification of global public measures in its prevention and repression established through international legal instruments.

**The Brazilian anti-corruption law and the accountability of the legal entity**

The fight against corruption as an international public policy arises from North American pressure of disincentive to corruption practices on a global scale after the passing of the *Foreign Corrupt Practice Act* (FCPA) in the year of 1977, which originated from a scandal involving the US aircraft company *Lockheed Aircraft Corporation* who paid bribes to foreign public officials of approximately U$ 22 million between the years of 1950 and 1970 (PAGOTTO, 2013, p. 24).For over two decades the United States have expressed particular interest in the impact of corruption at an international level, especially in international negotiations, since the US companies were suffering damage when competing unfairly with domestic companies from countries that did not repress, and even encouraged corrupt practices (ELLIOT, 2005, p. 931). Currently, there are a number of international instruments addressing the issue of the fight against corruption.

There are two ways of increasing the efficiency of the fight against corruption in modern States, one is to increase public transparency and the incentives for the supervision of the administrative activity, another is the effective enforcement of the law of a “more effective law enforcement” (ROSE-ACKERMAN, 2010, p. 8). International treaties work in these two perspectives, this study will focus on the latter.

Amongst the instruments used by international policies against corruption through the strengthening of the law are the criminalization of money laundering, the typification of illicit enrichment, forfeiture and asset recovery. In this way, international criminal policy links these instruments to the accountability of legal entities.

Aware of the role that legal entities represent it in the economic activity and its relations with Public Authorities, most international anticorruption instruments require the States to adopt measures to recognize the liability of legal persons for acts of corruption in which they can be involved. The provisions are of criminal liability or other nature, provided they are effective, proportional and discouraging, with an emphasis on economic aspects (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p.215). The choice of attributing criminal liability to the legal entity is the outcome of an "international trend" and not of "international

law" behold, according to international instruments, States may opt for other models such as administrative sanctions and security measures, with the option for the criminal measures, in a strict sense, a trend manifested in the continental European countries in the last two decades (SILVA SANCHÉZ, 2013, p. 20).

Within the realm of the United Nations, two Conventions stand out, the Palermo Convention and the Convention of Merida. The United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, approved on December 12, 2000 has as its main feature the promotion of legislative and administrative instruments of international cooperation to effectively prevent and punish international organized crime (BARBOSA, 2008, p. 73). This convention would be the necessary legal framework for international cooperation aimed at fighting, amongst other things, criminal activities such as money laundering, corruption, trafficking of wild species in danger of extinction, crimes against cultural heritage and the link between criminal organizations and terrorism (UN, 2004, p. 2).

In the following articles, measures are established in order to fight bribery of public officials (article 8) and the accountability of legal entities (article 10).The liability of legal entities involved with organized criminal groups should be established in the civil, administrative and criminal spheres, respecting the peculiarities of the legal systems of the States.

Shortly after the meeting in Palermo, the UN General Assembly adopted Resolution 55/61 recognizing the need to develop an effective international legal instrument against corruption independent from the Convention against Transnational Organized Crime, establishing a special committee in charge of its creation (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 199). Thus, on October 31, 2003 the United Nations General Assembly adopted the Convention against Corruption, known as the Merida Convention, enacted in Brazilian regulations by Decree no. 5.687/06.

The objectives of this Convention, in line with other international instruments against corruption developed by regional organizations such as the OAS, the European Counseland the African Union, are to harmonize the sanctioning responses with the internal Laws, as well as to facilitate international cooperation amongst states providing effective mechanisms for crime prevention against the difficulties faced in their pursuit on an international level (PÉREZ CEPEDA e BENITO SÁNCHEZ, 2011, p. 197).

The liability of legal persons is addressed in Article 26 of the Merida Convention. It is determined that countries shall take the necessary measures in order to establish the liability of legal persons for acts of corruption. The liability should be in accordance with the principles of the internal legal system and may be in the criminal, civil or administrative law spheres, regardless of the determination of the attribution to natural persons involved in the criminal activity. The sanctions shall be pecuniary or diverse in nature and should be effective and dissuasive.

In face of the international commitments undertaken by the Brazilian State, on August 1, 2013, the Law no. 12.846 was published providing for civil and administrative liability of legal persons for acts of corruption. The new Brazilian law stipulates in Article 2 that legal persons shall be objectively liable, in the civil and administrative spheres, for the acts of corruption practiced in their interest. Such liability is dependent and will not exclude the subjective liability of the natural persons involved in the unlawful conduct (art. 3º). Thus, what is perceived is that the Brazilian legal system has incorporated the guidelines of the international instruments of accountability of the legal entity, yet with some peculiarities.

The liability of legal entities is limited to the legal fields of civil and administrative law, which represents, in principle, pecuniary penalties. On the other hand, the liability will be determined in an objective way, which means that it will not depend on evidence of fault.

For the legal person to be convicted to pay a fine it will be sufficient a relation of attribution of the unlawful act, regardless of the investigation of its culpability.

In this way, in line with the commitments made by the Brazilian State in the model of the fight against corruption through the strengthening of the Law, the administrative liability of the legal entity for acts of corruption was created, with an added waiver of the evidence of culpability. However, this scenario created by Law no. 12.846/13 has characteristics that surpass the sphere of administrative liability so that its legal nature should be analysed under a material and not merely formal prism.

**Criticism of the form of liability adopted in Law n. 12.846/13**

The objective of the new Brazilian law is to create disincentives to corrupting practices, however, the chosen form of accountability cannot produce these effects, especially because of two major criticisms that can be made, its materially penal nature and the option for accountability by attribution.

It can be argued that the anti-corruption law, while establishing the administrative liability of legal persons in fact manifests a material nature of criminal law. Although restricted to the administrative sphere, the law has adopted a number of measures of an eminently criminal nature such as the high monetary fines (article 6$^{th}$), forfeiture of property, suspension of the activities and compulsory dissolution (article 19) and its criteria for imposing sanctions (article 7$^{th}$). However, if on one hand the law appropriates penal instruments, on the other hand, it ignores the guarantees of that system and imposes the objective liability in total disregard of the material and procedural limits of application of criminal provisions (DE OLIVEIRA, 2014, p. 3).

This characteristic of the law 12.846/13 does not stand alone in the legal system, on the contrary, it represents a trend of recrudescence of other areas of law through severe sanctions. It is noticed nowadays that the administrative law and, also, the civil law, advance in directions of greater control, with eminently sanctioning characteristics, imposing severe restrictions of rights without, however, carrying with it the same guarantees inherent to criminal law such as the presumption of innocence and legal defence. The problem becomes even more serious when a "labels fraud"is noted. It does not matter the labelling that is given to a law, if its contents are of social regulation through the most serious legal sanctions that the State can provide it will be a criminal law, and, therefore, it should bring with it the guarantees to such harsh penalties prescribed in the Rule of Law (BUSATO, 2013, p. 62).

This characteristic may impede the implementation of the new law making it ineffective for the purpose of its publication, which was to discourage corruption. The norm also lacks regulation and there is no certainty of how it will be applied, however, when establishing an objective liability with strict penalties while ignoring penal procedural guarantees it might not move towards its applicability, except to its unconstitutionality for violating the principles of culpability, the presumption of innocence and legal defence. Moreover, by creating a very rigid instrument and limiting guarantees a counterproductive norm that does not generate any effects can be produced and stimulate negative behaviours in face of the feeling of impunity created.

On the other hand, the adopted model by the new Brazilian law was the responsibility of the legal person by attribution; this means that the liability of the legal entity is tied to an act attributed to a natural person. To be able to attribute liability to a legal person, even in objective modality, evidence of the attribution of the act to the physical agent and the demonstration of their guilt will be required.

Although Article 3 of the law provides that the accountability of the legal person does not exclude that of the natural person agents and which is independent of their individual liability, in order to be able to attribute a corrupt act to the legal person it is

necessary to demonstrate at least objectively the relationship of attribution with the natural person agent and that the illegality was committed to the advantage of the legal entity. With an established attribution model, there is no way to establish the causal link between the act of corruption and the legal person without the imputation of conduct to some natural person.

What at first glance seems simple and efficient when ruling out the guilt factor and avoiding the pursuit of authorship in the context of an offense of corporate corruption does not survive a more detailed analysis of its contents. There is no way to establish a causal link between the corruptive act and the legal entity without stepping into the imputation of the act to a natural person agent, and in a more assured view, their culpability for the act. Thus, the effectiveness of the new law as a means of inhibiting corruptive behaviours can be very limited.

**Conclusion**

Brazilian law provides for criminal liability of the legal entity limited to cases of crimes against the environment.In these cases the attribution model is adopted, imposing the necessary co-authorship between natural persons and legal entities. Brazil neither has an intervention, or administrative sanctioning law, in this way economic crimes and crimes against the public administration cannot be attributed to a legal entity, but only to the natural persons that compose it, which must pass through the difficult task of authorship attribution for the acts committed in the exercise of the business activity.

While corruption is as old as the exercise of public power in Brazil and can be associated with its process of colonization, it constitutes a practice that generates losses of major consequence to the State, including those of an economic nature. Corruption causes detrimental effects to market relations insofar as it breaks down the relations of rationality and the free initiative, as well as causing losses to the State with the misuse of public resources, unnecessary investments and the reduction of foreign investments.

There are two ways to fight against the corruption promoted by international legal acts, by enhancing transparency and the strengthening of repressive laws for this practice. In respect of the strengthening of repressive laws, the international acts encourage the liability of the legal entity for acts of corruption, be it through the civil, administrative or criminal channels.

Brazilian legislators met the commitments assumed internationally with the enactment of Law n. 12.846/13, through which it was established the administrative liability of the legal entity for acts of corruption practiced in its benefit. According to the law, such liability will be determined regardless of guilt and accountability of natural persons who have participated in acts of corruption.

However, the Brazilian legislators' choice may not generate the expected effects on the fight against corruption. The possible lack of effectiveness of the Brazilian law is due to two factors, its criminal materiality and the option for the liability by attribution.

Although the studied provision is formally on administrative law, the analysis of its contents, such as the severity of the provided sanctions, allows the assertion that it is a law of criminal content symbolically nominated as an administrative law. Even more serious is that, despite attributing materially criminal penalties it leaves out the guarantees of the criminal system, especially with the liability being independent of any evidence of guilt.

On the other hand, although an objective liability is established, the imputation model is of attribution, thus, the liability will only be attributed when some natural person of its organizational structure can be objectively attributed, which may generate inefficiency of the system adopted in the new law.

Therefore, despite the objectives of the Brazilian legislators in forming an efficient instrument in the fight against a phenomenon that is so severe as corruption, the adopted

model is not suitable for its purpose. As opposed to the expected effects, the difficulty of implementation of the legal entity liability system created by the Brazilian anti-corruption law can result in the sensation of impunity and in the stimulation of corrupting behaviours.

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